# STATE OF MICHIGAN

# COURT OF APPEALS

---

CARRIE LYMAN,

Plaintiff-Appellant,

v

TOUNDAS MOTOR SPORTS GROUP, INC., d/b/a TMG SPORTS MARKETING, RANDY HEAGY, PETER TOUNDAS and BOB LAWSON,

Defendants-Appellees.

---

UNPUBLISHED
March 8, 2007

No. 271428
Oakland Circuit Court
LC No. 05-068194-NZ

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

In this Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. and civil assault and battery case, plaintiff appeals by right from the trial court's order granting summary disposition to defendants under MCR 2.116(C)(10). We affirm in part and reverse in part. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed the instant suit in August 2005 alleging three counts: (1) violation of ELCRA—sex/pregnancy discrimination; (2) violation of ELCRA—sexual discrimination and harassment; and (3) assault and battery. Plaintiff worked for defendant Toundas Motor Sports Group, Inc. (TMG) from 1999 to 2003. In June 2003, plaintiff announced she was pregnant. After her baby was born on July 28, 2003, plaintiff took 13 weeks of maternity leave.

When plaintiff returned to work, she felt "uncomfortable," "awful" and "discriminated against." About three weeks after returning to work, plaintiff brought her sick daughter to work with her. She requested that she be allowed to leave and work and make phone calls from home. Plaintiff was fired that morning. In her complaint, plaintiff also alleged that the individually named defendants each touched her inappropriately during the course of her employment.

After taking plaintiff's deposition, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10), arguing that plaintiff's deposition testimony did not support her allegations of a discriminatory failure to promote, sexual harassment, or assault and battery. The trial court granted defendants' motion.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*; MCR 2.116(C)(10), (G)(4).

Plaintiff first argues the trial court erred in granting defendants' motion for summary disposition of her sex/pregnancy discrimination claim. We disagree. Defendants argue that this Court should only consider this claim as it relates to plaintiff's "failure to promote" argument. Defendants assert that plaintiff pleaded no facts related to her discrimination claim as it related to her termination. A complaint must include "specific allegations necessary to reasonably inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). Here, all of the facts pleaded under the heading "violation of ELCRA sex/pregnancy discrimination" heading relate to a "failure to promote" argument. Plaintiff now argues that her termination was discriminatory because she was terminated for attendance issues when other employees with similar issues were not terminated and that her job duties were taken from her when she returned from maternity leave. Plaintiff never pleaded these allegations and never amended her complaint to reflect them; thus, defendants were not reasonably informed of these claims. Therefore, we will consider plaintiff's sex/pregnancy discrimination claim only as it relates to her "failure to promote" argument.

MCL 37.2202(1)(a) provides, in part, that an employer shall not "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of … sex.…" The term "sex" is defined in the ELCRA as including pregnancy. MCL 37.2201(d); *Sniecinski v Blue Cross & Blue Shield of Michigan,* 469 Mich 124, 132; 666 NW2d 186 (2003). Unless a plaintiff presents direct evidence of employment discrimination, the plaintiff must establish a prima facie case from which discrimination may be inferred. *DeBrow v Century 21 Great Lakes, Inc* (*After Remand*), 463 Mich 534, 537-540; 620 NW2d 836 (2001).

In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green,* 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). This approach allows "a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination." *DeBrow, supra* at 538. To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) her failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 463; see also *McDonnell Douglas, supra* at 802.

Here, plaintiff's deposition does not support her claim of sex discrimination based on a failure to promote. Plaintiff offered no testimony that she applied for a promotion during or after

her pregnancy. She offered no testimony that she was qualified for a promotion or that defendants were attempting to fill such a position. The only adverse employment decision to which plaintiff testified was her firing. Furthermore, plaintiff did not plead a claim based on her firing. Plaintiff's deposition testimony does not support a prima facie case of sex discrimination under a "failure to promote" theory. Thus, the trial court properly granted defendants' motion for summary disposition.

Defendant next argues the trial court erred in granting summary disposition on the assault and battery claims against defendants. We hold that the trial court properly granted summary disposition as to defendants Toundas and Heagy, but that it erred as to defendant Lawson.

"An assault is defined as any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). A battery is defined as "the willful and harmful or offensive touching of another person which results from an act intended to cause such a contact." *Id.*

Plaintiff stated that the touchings made her feel uncomfortable and were unwelcome. Thus, she has established that the touchings were harmful or offensive to her. But there is nothing in the present record that would allow this Court to determine defendants' intent as they have not submitted any affidavits or depositions and plaintiff did not offer any insight into their intent in her deposition.

Nonetheless, defendants are correct in their assertion that the majority of these claims could have been properly dismissed under MCR 2.116(C)(7) because plaintiff acknowledged they occurred before the two-year period of limitations applicable to assault and battery under MCL 600.5805(2). "This Court will uphold a trial court's ruling on appeal when the right result issued, albeit for the wrong reason." *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 82; 709 NW2d 174 (2005).

Plaintiff filed her complaint on August 3, 2005. Plaintiff went on maternity leave on July 27, 2003; thus, any alleged assault or battery must have occurred during the few weeks she worked after she returned from maternity leave in October and November 2003. She alleged that Toundas put his hand on her shoulder in a manner that made her feel uncomfortable at a holiday party in 2002 and that Heagy patted her on the bottom during a time when she was working on "the Pontiac program."[1] Neither of these incidents occurred within the two-year period of limitations.

Plaintiff also alleged that Lawson gave her shoulder rubs that made her feel uncomfortable. She did not specify when these shoulder rubs occurred, so summary disposition under MCR 2.116(C)(7) is inappropriate as to plaintiff's claim of assault and battery against

[1] Plaintiff testified that she was working on this project before her maternity leave and after she returned to work from maternity leave she only worked on the "Corvette Heritage Tour."

Lawson. But, any claims of assault and battery based upon shoulder rubs that occurred before plaintiff's maternity leave are barred by the two-year period of limitations. Defendants argue that Lawson's shoulder rubs could not be considered assaults because a federal court applying Michigan law recently held that shoulder rubbing did not constitute assault and battery. See *Russell v Bronson Heating & Cooling*, 345 F Supp 2d 761 (ED Mich, 2004). The *Russell* court actually determined that based on the facts of that case, the plaintiff's male supervisor did not commit an assault under Michigan law when he rubbed the female employees' shoulders without permission because the supervisor snuck up behind her, and the plaintiff did not experience a reasonable fear or apprehension. *Id*. at 796. In addition, the court found no evidence the defendant intended his touch be harmful or offensive. *Id*. at 796-797. Here, there is no evidence to conclude as a matter of law that Lawson did not commit an assault or battery.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder